In the Supreme Court of the United States

OCTOBER TERM, 1979

THE ALMA SOCIETY, INC., ET AL., PETITIONERS

v.

IRVING MELLON ET AL., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(PROFESSOR) CYRIL C. MEANS, JR.
New York Law School
57 Worth Street
New York, N.Y. 10013
(212) 966-3500

BERTRAM E. HIRSCH
76-17 Two Hundred Fiftieth Street
Bellerose, N.Y. 11426
(212) 347-3022

Attorneys for Petitioners

INDEX

CITATIONS

CASES

STATUTES AND LEGISLATIVE DOCUMENTS

Federal

STATUTES, etc. (Continued)

State

(The foregoing statutes are printed in Appendix A, footnote 1, at 4a-7a.)

City

(The foregoing statute is printed in Appendix D, at 46a.)

CONGRESSIONAL DEBATES, 1864-66

(References are to the Congressional Globe, by Congress, Session, and page. E.g., 38-2: 138 = 38th Cong., 2d Sess. 138.)

CONGRESSIONAL DEBATES, 1864-66 (Continued)

BOOKS AND OTHER PUBLICATIONS

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No.

THE ALMA SOCIETY, INC., ET AL.,

Petitioners,

v.

IRVING MELLON ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, The Alma Society Incorporated, Joyce Aaron, Eleanor B. Barron, Marilyn Louise Beck, Susan Roberta Brody, John Franklin Filippone, Anne Fosby, Ronnye Jacovitz Futrell, Rolande Synge Hampden, Michael Jay Hatten, Vicent Konola, Katrina Maxtone-Graham, Anita McCarthy, Raymond Rand, Rosemarie Smith, Joan Sommers, Clothilde Louise

Starke, Robert Van Laven, Hope Herman Wurmfeld, and Karl M. Zimmer, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 22, 1979.

Respondents are: Irving Mellon, Director of Vital Records, City of New York, Richard J. Garofano, Village Clerk, Mount Kisco, New York, Beverly La Tona, City Clerk, City of Dunkirk, New York, the Honorable Millard L. Midonick, Surrogate, New York County, the Honorable Bertram L. Gelfand, Surrogate, Bronx County, the Honorable Bernard M. Bloom, Surrogate, Kings County, the Honorable Louis D. Laurino, Surrogate, Queens County, the Honorable John D. Bennett, Surrogate, Nassau County, the Honorable Ernest L. Signorelli, Surrogate, Suffolk County, the Honorable Louis B. Scheiman, Surrogate, Sullivan County, Louise Wise Services, Spence-Chapin Services to Families and Children, Children's Aid Society (Child Adoption Service), Jewish Child Care Association of New York, and New York Foundling Hospital.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported (but which soon will be reported at 601 F. 2d 1225) appears in Appendix A hereto (at 1a-28a). The opinion of the District Court is reported at 495 F. Supp. 912, and appears in Appendix C hereto (at 32a-43a).

JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 1979 and appears in Appendix B hereto (at 29a-31a).

The jurisdiction of District Court was invoked under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 (3).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether Thirteenth Amendment rights (unlike Fourteenth Amendment rights) are absolute, and not subject to balancing as against the interests of others.

2. Whether the Framers intended the Thirteenth Amendment itself, unaided by

ongressional legislation, to prohibit the second incident of slavery.

3. Whether New York adoption laws are, because of their sealed record features, violative of the Thirteenth Amendment in regard to adult adoptees by reason of imposing upon them the second incident of slavery.

While additional questions were argued and decided in the courts below under the Fourteenth Amendment's Due Process and Equal Protection Clauses, petitioners consider them as subsidiary to their central claim, which rests on the bedrock of the Thirteenth Amendment. Accordingly, only the foregoing questions will be argued in this petition for certiorari.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth in Appendix A, footnote 1, at 4a-7a, and in Appendix D, at 44a-46a.

STATEMENT OF THE CASE

The 19 individual petitioners are adults who were adopted as children and

now seek access to (1) their original birth certificates, (2) the court records in their adoption proceedings, and (3) the records of any private agencies involved in their adoptions.

Various New York statutes require that these records be sealed and that access to them be granted only by court order. Public Health Law § 4138; New York City Administrative Code § 567-2.0 (original birth certificates); Domestic Relations Law § 114 (court records); Social Services Law § 372 (agency records).

The respondents are (1) municipal officials who have custody of the original birth certificates of the petitioners; (2) surrogates of the counties in which twelve of the petitioners were adopted and in which the court records in their adoption proceedings are now kept under seal; and (3) five private agencies that handled the adoptions of fourteen of the petitioners and that now keep their records of these adoptions under seal.

Petitioners claim that adult adoptees should be given access to the records of their adoptions with no showing of cause

whatsoever. The present system of requiring a showing of cause and a court order to gain access, petitioners say, leads to psychological trauma, risk to health due to ignorance of the medical history of the adoptee and his natural ancestors, danger of incest, and a burden on the adoptee in regard to the free exercise of religion.

Respondents moved to dismiss the amended complaint. The District Court granted the motions to dismiss. The Court of Appeals affirmed.

Each of the 19 individual petitioners executed an affidavit, which he annexed to the complaint, detailing such information as he has concerning his pre-adoptive background, stating when and how he first learned that he was adopted, and the effect that this knowledge, coupled with the sealing of his pre-adoption records, has had on him over the years.

The facts alleged in the 19 individual affidavits must be taken as true for the purpose of judgment appealed from, since the District Court granted motions to dismiss.

What follows is a sampling of the facts to be found in the 19 affidavits, arranged under the foregoing captions.

Psychological Trauma, Pain and Suffering

Every individual affidavit details psychological pain and suffering, ranging from "rage and frustration" to a "pinnochio syndrome". One "felt there was no 'I' or 'me' that counted". Another, a clinical social worker, put it thus: "not having all the pieces' has been like living with a benign tumor: It doesn't grow and it causes pain only occasionally, but it always exerts pressure which is uncomfortable, distracting, and irritating. It never goes away".

Another's "primary feeling was loneliness, unconnectness . . . I felt as if I were on an island. I could tell my children where they came from, even though I barely felt related to them because I was so depressed; but I couldn't tell myself where I came from".

Twelve relate resorting to psychotherapy: one for 18 years, one for 15, one for 10, one for 7, two for 6, another

for 3. One began treatment at age 11; another at age 14.

Effect of Lack of Family Medical History

The affidavits of five petitioners who have found their natural families, and through them their family medical histories, illustrate various types of medical information which the sealed records laws deny to non-finder adoptees. One of these was told by respondent Spence-Chapin that one of his natural grandparents had died of cancer; after finding his natural family he learned that three of his natural grandparents had died of cancer. Another, before finding her natural family, regularly used birth control pills. She developed a lump in her breast which, upon removal, proved benign. Later on, after finding her natural family, she discovered that it had a history of cystitis. Had she known this, she would never have used birth control pills; her gynaecologist would have advised her to use a different contraceptive technique. A third bore two daughters with shallow hip sockets, an inherited characteristic, but, in the case of the second daughter, this condition was not obvious.

After finding her natural family, she learned that her niece had been born with the same condition; upon reporting this fact to her children's pediatrician, he investigated her second daughter's hip socket more carefully and discovered the condition which otherwise would have gone undetected. A fourth, upon finding his natural mother, discovered that she had long suffered from diabetes, and that many of her male relatives had died before 50. A fifth, after finding her natural mother, was greatly relieved to learn of the absence of the diseases she had long feared might be hereditary in her natural family.

Non-finders must continue to suffer anxiety concerning themselves and also their own natural children. The gynaecologists of two petitioners have presented their patients with a dilemma: Either earlier (at age 40 rather than the customary 45) mammography, because of lack of family medical history, with the accompanying increase in lifetime radiation dosage, or mammography at 45, with risk of breast cancer in the 40-50 age interval, if the absent family medical history would have indicated earlier mammography.

Another, who has had problems with her ovaries, is bothered by not knowing whether her mother took DES while carrying her. One had to undergo ankle surgery; the anesthesiologist, without access to family history, was unable to advise which type of anesthesia would be most safe. Seven years ago, another began to suffer a strange combination of metabolic and systolic symtoms; her doctors would be enormously aided if they had her complete and up-to-date family medical history.

The foregoing merely scratches the surface of the bewildering variety of medical conditions, psychiatric as well as physical, for the correct treatment of which modern physicians need to know the patient's complete, up-to-date medical history.

Consciousness of Danger of Unwitting Incest

One petitioner, adopted at the age of nine, who remembered that she had an older brother, stated: "I went through life with a lurking fear that I might become involved, without either of us knowing it, in an in-

cestuous relationship. That anxiety colored my relationships over the years." This did not end until she found her natural mother and relatives. Another stated: "Throughout my life, I have had an aversion to blondes, but only if the woman's natural hair color was blonde: If I discovered that she had dyed her hair and that it was naturally brunette, the aversion disappeared. I could not explain this aversion until after I met my natural sister, who is naturally blonde. It then dawned on me, that, since I am myself blond, I had always, through this aversion, been manifesting an anxiety about possible incest."

Crisis of Religious Identity

Three petitioners were reared in Jewish homes, but later learned that their natural mothers were not Jewish, and that, under Jewish religious law, this prevented them from being Jewish, and would also mean that any children born of them were likewise not Jewish. For all three -- one an unmarried woman, the other two married and the mothers of children -- the sealed records laws create a crisis of religious identity.

REASONS FOR GRANTING THE WRIT

In the past few years, adult adoptees have begun to insist on their right to know the truth of their origins. The controversy over this demand has become acute. After Alex Haley's Roots was televised to one of the largest viewing audiences in history, the nation became aware of the importance of natural heritage to a group -- black Americans -- who historically had often been deprived of knowledge of its familial past. The parallel between the American black experience in this regard, and that of adoptees whose records have been sealed, was suddenly cast into bold relief.

Research now reveals that this parallel is not a merely superficial one. In the section which follows, on petitioners' Thirteenth Amendment claim, the speeches of the Framers of the Thirteenth Amendment, time and again, strike chords hauntingly similar to the experiences of adult adoptees of today. Even when subjected to the most rigorous legal analysis, flaws do not appear. Where A sells B to C, in furtherance of the interests of A and C,

but without B's consent, it does not matter whether B is an adult slave in Charleston in 1860 or a 'free' infant in New York in 1960. In either case, B had nothing to do with the transaction except to be the object of it.

Furthermore, where the ante bellum transaction sold a slave child to a new owner different and distant from the owner of the child's parents, the modern adoption transaction was foreshadowed with fearful symmetry. Not all the ills to which the modern adoptee is heir were the lot of the sold-off slave. In the much less advanced state of medical knowledge, family medical history did not figure then so prominently as now. But the psychological trauma, and the danger of unwitting incest, are common to both periods. In his historical treatise, The Black Family in Slavery and Freedom, 1750-1925 at 89 (1976), Herbert G. Gutman mentions a man who married a woman after freedom and found out she was his mother: he had been sold from her as an infant. Such a marriage occurred in California in 1969, between an adoptee and his natural mother, who had surrendered him for adop-

tion as an infant. The San Diego Tribune, Sept. 2, 1971, p. B9, cols. 1-2; The San Diego Union, Sept. 3, 1971, p. B1, cols. 6-7; p. B4, col. 1.

In regard to family medical history, Baltimore Judge Marshall A. Levin, in The Adoption Trilemma: The Adult Adoptee's Emerging Search for His Ancestral Identity, 8 Baltimore L. Rev. 496, 501 n. 38 (1979), writes: "In the absence of knowledge of pathology among an adoptee's ancestors, severe medical disorders can develop or go unnoticed for years. Of 1545 genetic diseases 692 have been shown to be hereditary." A recent article, Hereditary Renal-Cell Carcinoma Associated with a Chromosomal Translocation, 301 New Eng. J. of Medicine 592 (Sept. 13, 1979), shows how the discovery of this genetic defect and its association with this form of cancer in ten members distributed over three generations of an Italian-American family took place. Three female family members in the third generation were diagnosed only through screening. Had they been surrendered for adoption, their susceptibility would not have been discovered in time. Had they been adopted,

and had they approached a New York court, asking that their records be opened so that they could discover their family medical history, they would have been told that mere curiosity did not amount to good cause. Adult adoptees, like everyone else, can obtain family medical history from only one source, their families -- natural, not adoptive.

To an adult adoptee, the title of Dr. Aubrey Milunsky's recent book, Know Your Genes (1977), comes as a chilling reminder that, unlike all non-adopted people, knowledge of his genes is fruit on a forbidden tree.

Petitioners' Thirteenth Amendment Claim Was Erroneously Rejected by the Court Below

The court below devoted six pages of its opinion (at 23a-28a) to an analysis and critiques of petitioners' Thirteenth Amendment claim.

The first critique is that the argument is "novel" and "concedely not based on the decided cases". That is true, but such is always the case where a question arises for the first time. If there are no decided cases upon which to base the argument, there is a wealth of legislative history showing the Framers' intent.

The court below quoted the description of the second incident of slavery in the speech of Senator James Harlan of Iowa of April 6, 1864, (Cong. Globe, 38th Cong., 1st Sess. 1439), a passage which focuses upon the severance of the parent-child relationship from the child's point of view ("robbing the offspring of the care and attention of his parents") (24a).

Senator Harlan's reference to this incident of slavery was by no means an isolated one. Ten of the other Framers of the Thirteenth Amendment--Senators Henry Wilson of Massachusetts, Daniel Clark of New Hampshire, Charles Sumner of Massachusetts, and Representatives Thomas B. Shannon of California, Orlando Kellogg of New York, William D. Kelly of Pennsylvania, E. C. Ingersoll of Illinois, James M. Ashley of Ohio, John A. Kasson of Iowa, and James A. Cravens of Indiana--also referred to it in their speeches. Three of them--Sumner (id. at 1479 and 1481), Ingersoll (id. at 2990) and Kasson (Cong. Globe, 38th Cong., 2nd Sess. 193)--focused upon the slave parent as the victim of the involuntary separation from the child. Five of them--Wilson (Cong. Globe, 38th Cong., 1st Sess. 1324), Clark (id. at 1369), Shannon (id. at 2948), Kellogg (id. at 2955), and Kelly (id. at 2984)--focus on the enforced separation itself, identifying the parent and child as equal victims. Two of them--Ashley (Cong. Globe 38th Cong., 2nd Sess. 138), and Cravens (id. at 221) focus upon the child as the victim of the separation. Only Harlan, in separate sentences,

focuses on both the parent and the child as distinct victims of the separation.

These variations in focus and emphasis among the eleven Framers who denounced this incident of slavery do not indicate any disagreement among them, but merely reflect the particular interests of individual debaters. All would have agreed that the slave-child, no less than his parent, was victimized by enforced separation.

The speeches of Representatives Ashley and Cravens are of especial interest, because additionally they identify the special case where the slave children sold were the offspring of the owner. Ashley mentioned the sale of "even the children of the slave-master" (Cong. Globe, 38th Cong., 2nd Sess. 138). Cravens refers to the still more specialized case in which "the very children of the deceased slaveholder himself [were] sold to satisfy his merciless creditors" (id. at 221). In the more general case mentioned by Representative Ashley, where a living master sold his own children, the second incident of slavery took on contours indistinguishable from the modern adoption transac-

tion. Pre-Thirteenth Amendment State law permitted the master-parent to sell his slave-child, not as an incident of the parent-child relation, for no parent of a free child was permitted to do this, but rather as an incident of the master-slave relation, for every master was permitted to do this in regard to his slave, whether the slave was his child or not. When Twentieth Century adoption laws permit a parent to do this, imposing not merely a minority-duration, but a lifelong separation upon his child, it has reinstituted the second incident of slavery.

That the often lifelong aspect of enforced separation was a concern of the Framers is evident from Representative Shannon's denunciation of the "tearing from the mother's arms the sucking child, and selling them to different and distant owners" (Cong. Globe, 38th Cong., 1st Sess. 2948).

Of all the Framers, Senator Harlan made the most elaborate analysis of the institution of slavery, and the most telling critique of the reasons advanced by its defenders. Referring to the maxim, partus sequitur ventrem, Harlan accepted

(though only for the purpose of his argument) the validity of a master's claim to the lifelong services of his female slave. Having done that, Harlan then asked: "Whence, then, the origin of the slaveholder's title to the services of his slave's children?" (Cong. Globe, 38th Cong., 1st Sess. 1438). Harlan then suggests the following:

> But it may be said that the slave mother, owing all the service which she can reasonably perform to her master, can have no time or means to apply in the support of her own offspring, and therefore whatever of labor or means may be applied by her in providing for her children belongs to the owner of the mother, so that the offspring in that case would not owe service in return to the mother, but to the mother's owner. Admit this to be true, and it will follow that the owner of the slave mother will acquire as good a title to the services of the children as the mother herself otherwise would have held had she not been a slave, and no better title. But we have seen a moment since that her title cannot reach beyond the period of the child's minority. Just so soon as the child shall have returned to the mother an equivalent for the care and labor applied by her in the support of the child during the years of its helplessness,

> her title ceases. Then if the owner of a slave mother takes the same title and no more, the slavery of the children of a slave mother cannot justly extend beyond the period of the child's minority. Then I inquire whence the claim of title to the services of the child of a slave mother after the period of its minority; after it shall have paid the cost of its keeping during the years of its helpless infancy?

Already, in an earlier passage, Harlan had dealt with the right of a free parent to the child's services during minority, and had pointed out that in this country the child's minority ends at either eighteen or twenty-one years from the date of birth, adding that he thought that "in no civilized country is the period of minority extended beyong the age of twenty-five" (id. at 1437).

Harlan's argument that, even granting that the status of slavery descended through the female, it could not justifiably last longer than the slave-child's minority, clarifies the jurisprudential premises upon which the Thirteenth Amendment rests. These pay high regard to the passage from minority to adulthood as ter-

minating any obligation imposed by a parent upon a child during the latter's minority.

The court below did not include in the portion of its opinion rejecting petitioners' Thirteenth Amendment claim an argument made by some of the respondents, namely, that the Thirteenth Amendment is addressed only to racial discrimination. Petitioners mention this argument here only because it appears as a dictum in a footnote in the Opinion of this Court in Chapman v. Houston Welfare Rights Organization, 99 S. Ct. 1905, 1918 n.41 (1979) ("the Fourteenth Amendment which, unlike the Thirteenth Amendment, is not limited to racially based claims of inequality"). It is quite possible, however, that three of the five signatories of this Opinion of the Court did not agree with this particular observation, as may be gathered from two footnotes in the separate Opinion authored by Mr. Justice Powell, 99 S. Ct. at 1919 n.1, 1923 n.13 (para. 3).

In any case, the notion that the Thirteenth Amendment is addressed only to racial discrimination is an historical error, because some slaves were owned not by white,

but by free Negro masters, and they were emancipated by the Thirteenth Amendment as well. The report of the Commissioners who, pursuant to Act of Congress, adjudicated the claims for compensation of nearly 1,000 slaveowners in the District of Columbia, shows that almost one per cent of the slaveowners were "colored" and this group owned just under one per cent of all the slaves in the District. H.R. Ex. Doc. No. 42, 38th Cong., 1st Sess. (1864) (Emancipation in the District of Columbia).

In an article based on much research, "Black Masters; a Side-Light on Slavery", North American Review, No. 588 (1905), 685, at 695, Calvin Dill Wilson recounted two cases, one of a free Negro in Trimble County, Kentucky, who "sold his own son and daughter South, one for $1,000, the other for $1,200", and another in Harford County, Maryland, "who sold his children in order to purchase his wife." The Framers of the Thirteenth Amendment would have regarded such voluntary sales of slave children by free black parents with as much revulsion as they did voluntary sales of slave children by white parents.

The second critique by the court be-

low of petitioners' Thirteenth Amendment claim is that this Court "has never held that the Amendment itself, unaided by legislation as it is here, reaches the 'badges and incidents' of slavery as well as the actual conditions of slavery and involuntary servitude" (at 25a). Warming to this theme, the court below felt that "all indications are to the contrary. Abolition of the badges and incidents the Court has left to Congress."

This conclusion is very hard to reconcile with the following language of Chief Justice Hughes, speaking for a unanimous Court in Bailey v. Alabama, 219 U.S. 219, 241 (1911), referring to the Thirteenth Amendment: "The plain intention was to abolish slavery of whatever name and form and all its badges and incidents . . ." In Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1971), this Court expressly characterized the question "Whether or not the Amendment itself did any more than" abolish slavery as one not involved in that case. It is, of course, the question in the present case, and is one of great importance.

The third critique of the court below

is based on its resolution of a seeming conflict between two statements in the dissenting opinion of Mr. Justice Harlan in Plessy v. Ferguson, 163 U.S. 537, at 555 (1896). On the one hand the court below acknowledges that Justice Harlan wrote that the Thirteenth Amendment itself "prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude," while on the other the court below points out that Justice Harlan also stated that the Thirteenth Amendment had been found "inadequate to the protection of the rights of those who had been in slavery", and so it was followed by the Fourteenth Amendment. The court below discerned a contradiction between the two statements and reconciled it as follows: "If the Thirteenth Amendment had by its own force and effect abolished all badges and incidents, all vestiges, of slavery, it would not have been inadequate" (26a). What the court below has done here is to suggest a solution to a problem that does not exist. There is no contradiction between the two statements in Justice Harlan's Opinion. In the first, he is referring to incidents of slavery as they had existed in the pre-1865 history of that institution. In the second, he is referring to

new disabilities, imposed by State statutes passed after the Thirteenth Amendment -- the new Black Codes -- on the freedmen.

The fourth criticism levelled by the court below at petitioners' Thirteenth Amendment argument "is that it proves too much" (26a). The Court below then added, "Abolition under the Amendment itself of all of the 'incidents' to which Senator Harlan referred would incorporate into the Thirteenth Amendment the privacy interests in the conjugal and parental relation, the right to hold property, the right to bring suit in court, the right to testify, freedom of speech and of the press, and the right to an equal education" (26a).

Petitioners agree with this sentence up to but not including the words: "freedom of speech and of the press, and the right to an equal education."

The Framers did refer to the fact that slavery had denied freedom of speech and of the press to abolitionists in the Southern States, and one of them--John F. Farnsworth of Illinois--complained of "the indictment in southern States of men in the North for anti-slavery publications in the City of New York. Then came requisitions upon the Governors of the North to surrender the bodies of these men to be taken South to be tried" (Cong. Globe, 38th Cong., 1st Sess. 2979). The impact of slavery upon freedom of speech and of the press was, in the minds of the Framers, primarily upon the free men of the North. Since they had never been slaves, this kind of impact was not what the Framers meant by badges and incidents of slavery: that rubric was reserved for the impact of slavery upon slaves. It is undeniable, of course, that Southern law would have justified a master in punishing his slave for expressing anti-slavery sentiments, but that was a very minor aspect of the overwhelming deprivation of personal liberty imposed upon the slave by his chattel status.

So far as "the right to an equal education" is concerned the court below makes clear that what it is thinking of is "equal funding of public school systems." In 1864-65, when the Thirty-eighth Congress was debating the Thirteenth Amendment, there were no public school systems anywhere in the South, and not all the States in the North had them. The speeches of Framers did refer to State laws forbidding

the education of slaves, but the type of education which those laws forbade was private, since there was no other in the South at that time. This aspect of the "proves too much" criticism turns out to be an anachronism.

If a State legislature were to add sections to its adoption law allowing an adoptive parent to punish an adoptee for expressing anti-adoption sentiments, or forbidding anyone to give private education to an adoptee, petitioners would contend that such laws would violate the Thirteenth Amendment. They would probably be struck down under the Fourteenth, because counsel and the courts are not accustomed to thinking in terms of the Thirteenth, but this would prove nothing more than that the two Amendments partially overlap each other. But if a State legislature were to punish nonadoptees for criticizing adoption, or forbidding the private education of nonadoptees, these laws would be unconstitutional only under the Fourteenth Amendment.

The fifth and last criticism in the opinion of the court below is that "It is the New York adoption laws themselves and

not the sealed records laws" which "create a new parent-child relationship between [petitioners] and their adoptive parents. [Petitioners] do not challenge the constitutionality of the adoption laws; thus their challenge to the sealed records laws even if cognizable under the Thirteenth Amendment, in the absence of congressional legislation, is misdirected" (28-a).

This analysis suggests a dichotomy between adoption laws on the one hand and sealed records laws on the other. No such dichotomy exists. There may be an adoption law without sealed records as well as one with sealed records. In the latter case, the sealed records provision is merely a feature or aspect of the adoption law itself, added, we are told, for the very purpose of encouraging adoption. Petitioners <u>do</u> challenge the constitutionality of adoption laws containing a sealed records provision, leaving it to the court to say whether such feature invalidates the entire statute or is severable. Even if severable (as petitioners believe it is), however, the sealed records provision is not somehting other than an adoption law. But for the tacit exception of "the right

of parents and guardians to the custody of their minor children or wards" from the proscription of the Thirteenth Amendment, Robertson v. Baldwin, 165 U.S. 275, 282 (1897), placing even minor children under an adoption law with a sealed records provision would violate that Amendment. The exception prevents this, but only during the adoptee's minority. Once he attains adulthood, the Thirteenth Amendment applies to him. At that point, because he is now an adult, no parent, natural or adoptive, any longer has custody of him, but both, the court below tells us, may, in their own interests and without the adoptee's consent, keep him in ignorance of his origin, and the State may aid them in effectuating this deprivation.

The question may legitimately be asked why the Thirty-ninth Congress, in enacting the Civil Rights Act of April 9, 1866, 14 Stat. 27, left unmentioned the first and second incidents of slavery (destruction of the conjugal and parent-child relations) whilst paying close attention to the third, fourth, and fifth incidents in Senator Harlan's list (i.e.,

contract, property, and judicial deprivations). The answer is simple. The new Black Codes, enacted in the wake of the proclamation of the adoption of the Thirteenth Amendment, had uniformly recognized the validity of freedmen's marriages, and some of them even validated the preemancipation unions of ex-slaves, and the new Codes generally recognized the legitimacy of the offspring of freedmen, thus affirming the parent-child relationship.

The Southern legislatures had done this because the first and second incidents of slavery had always been the hardest for slavery's apologists to defend, and now that slavery was gone, there was nothing to be gained by insisting on their continuance. On the other hand, though slavery was gone, the ex-slaves were still there. A sincere belief in their inferiority inspired the provisions in the new Black Codes designed to reinstitute the third, fourth, and fifth incidents of slavery. It was, therefore, at these three incidents, and at these alone, that Congress took aim in enacting the Civil Rights Act of 1866. There was no need to command the Southern States to recognize the conjugal and parent-child relations of the freedmen, because

they had already complied with Section 1 of the Thirteenth Amendment in this regard.

In Jones v. Alfred H. Mayer Co., 392 U.S. 409, 433-34 (1968), this Court provided the means of elucidating this question, by quoting the following passage from the speech of Representative M. Russell Thayer of Pennsylvania, who had been a Framer both of the Thirteenth Amendment and of the Civil Rights Act of 1866, during the 1866 debate on the latter measure:

> "[W]hen I voted for the amendment to abolish slavery . . . I did not suppose that I was offering . . . a mere paper guarantee. And when I voted for the second section of the amendment, I felt . . . certain that I had . . . given to Congress ability to protect . . . the rights which the first section gave . . . ."
>
> (Cong. Globe, 39th Cong., 1st Sess. 1151.)

This is a far cry from saying that only Congress can abolish an incident of slavery. Congress, acting in its ordinary legislative capacity under Section 2, can enforce the abolition of an incident, but that abolition itself was accomplished, for all time, in 1865, when Section 1 of the Thirteenth Amendment entered into force.

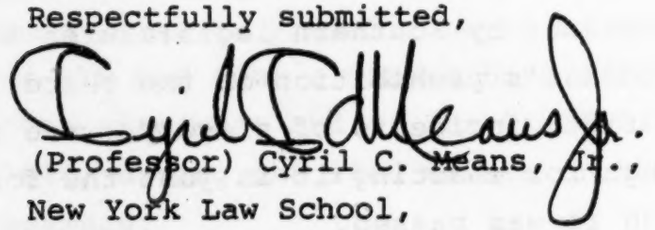
In addition, the Civil Rights Act of 1866 contained various enforcement provisions, such as criminal penalties and Federal court jurisdictional clauses, some exclusive others concurrent with State courts, which the Amendment itself would not generate. These considerations, together with massive resistance by Southern legislatures to the Amendment's prohibition of the third, fourth, and fifth incidents of slavery, were reason enough for enacting it in just the form in which it was passed.

Anyone who thinks that the radical Republicans of 1864-65 intended to leave it to any future Congress, possibly dominated, after readmission of Senators and Representatives from the ex-Confederate States, by those who had always defended slavery, to decide whether to abolish or to permit an incident of slavery, seriously mistakes the mettle and the mind of those hardy spirits of yesteryear.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,



(Professor) Cyril C. Means, Jr.,
New York Law School,
57 Worth Street,
New York, N.Y. 10013.
(212) 966-3500.

Bertram E. Hirsch,
76-17 Two Hundred Fiftieth Street,
Bellerose, N.Y. 11426.
(212) 347-3022.

Attorneys for Petitioners.

September 20, 1979.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 666—August Term, 1978.

(Argued March 19, 1979 Decided June 22, 1979.)

Docket No. 78-7593

THE ALMA SOCIETY INCORPORATED, JOYCE AARON, ELEANOR B. BARRON, MARILYN LOUISE BECK, SUSAN ROBERTA BRODY, JOHN FRANKLIN FILIPPONE, ANNE FOSBY, RONNYE JACOVITZ FUTRELL, ROLANDE SYNGE HAMPDEN, MICHAEL JAY HATTEN, VINCENT KONOLA, KATRINA MAXTONE-GRAHAM, ANITA MCCARTHY, RAYMOND RAND, ROSEMARIE SMITH, JOAN SOMMERS, CLOTHILDE LOUISE STARKE, ROBERT VAN LAVEN, HOPE HERMAN WURMFELD, and KARL M. ZIMMER,

Appellants,

—v.—

IRVING MELLON, Director of Vital Records, City of New York, RICHARD J. GAROFANO, Village Clerk, Mount Kisco, New York, BEVERLY LA TONA, City Clerk, City of Dunkirk, New York, the HONORABLE MILLARD L. MIDONICK, Surrogate, New York County, the HONORABLE BERTRAM L. GELFAND, Surrogate, Bronx County, the HONORABLE BERNARD M. BLOOM, Surrogate, Kings County, the HONORABLE LOUIS D. LAURINO, Surrogate, Queens County, the HONORABLE JOHN D. BENNETT, Surrogate, Nassau County, the HONORABLE ERNEST L. SIGNORELLI, Surrogate, Suffolk County, the

HONORABLE LOUIS B. SCHEIMAN, Surrogate, Sullivan County, LOUISE WISE SERVICES, SPENCE-CHAPIN SERVICES TO FAMILIES AND CHILDREN, CHILDREN'S AID SOCIETY (CHILD ADOPTION SERVICE), JEWISH CHILD CARE ASSOCIATION OF NEW YORK, and NEW YORK FOUNDLING HOSPITAL,

Appellees.

Before:

LUMBARD and OAKES, *Circuit Judges,*
and BRIEANT, *District Judge.**

Appeal from a judgment of the United States District Court for the Southern District of New York, Milton Pollack, *Judge,* dismissing the complaint challenging on grounds of Fourteenth Amendment Due Process and Equal Protection and the Thirteenth Amendment New York laws which require the sealing of adoption records. Held, judgment affirmed. The New York laws do not violate substantive due process because of the State's appropriate recognition of the privacy interests of the natural and adoptive parents; equal protection because the classification is not entitled to intermediate or strict scrutiny and because it substantially furthers important state interests, thereby satisfying even the intermediate test; or the Thirteenth Amendment because of the absence of congressional characterization of the state law as imposing a "badge or incident" of slavery.

* Of the Southern District of New York, sitting by designation.

CYRIL C. MEANS, JR., Professor of Law, New York Law School, New York, N.Y. (Bertram E. Hirsch, New York, N.Y., of counsel), *for Appellants.*

CHARLES BRODY, Assistant Attorney General (Robert Abrams, Attorney General of the State of New York), *for Appellees Surrogates Midonick, Gelfand, Bloom, Laurino, Bennett, Signorelli, and Scheiman.*

GERALD E. BODELL, BODELL & MAGOVERN, New York, N.Y., *for Appellee New York Foundling Hospital.*

LEONARD F. MANNING, Professor of Law, Fordham Law School, New York, N.Y., *for Appellee Jewish Child Care Association.*

DONALD J. COHN, WEBSTER & SHEFFIELD, New York, N.Y. (David A. Hom, of counsel), *for Appellee The Children's Aid Society.*

STEPHEN WISE TULIN, POLIER TULIN & CLARK, New York, N.Y., *for Appellee Louise Wise Services.*

ALLEN G. SCHWARTZ, Corporation Counsel for the City of New York (L. Kevin Sheridan and Carolyn E. Demarest; Lillian Gewirtz and Peter Lavigne, law clerks, of counsel), *submitted a brief for Appellee Irving Mellon.*

EPHRAIM LONDON, LONDON & BUTTENWIESER, New York, N.Y. (Helen L. Buttenweiser, of counsel), *for court-appointed law guardian.*

OAKES, *Circuit Judge:*

This appeal presents the question whether adopted persons upon reaching adulthood ("adult adoptees") are constitutionally entitled, irrespective of a showing of cause, to obtain their sealed adoption records, including the names of their natural parents. Appellants are adult adoptees and an association of such persons; and they urge that the New York statutes that require the sealing of adoption records[1] are facially invalid on Fourteenth

1 The statutes are N.Y. Dom. Rel. Law § 114, providing for the sealing of court records pertaining to adoption unless "good cause" is shown; N.Y. Pub. Health Law § 4138, providing for new birth certificates in the case, *inter alia*, of an adoption and destruction after microfilming or sealing of the original certificate; and N.Y. Soc. Serv. Law § 372 providing for confidentiality of public and agency records pertaining to abandoned, delinquent, destitute, neglected, or dependent children. The statutes in pertinent part are set out below.

N.Y. Dom. Rel. Law § 114:

If satisfied that the best interests of the adoptive child will be promoted thereby the judge or surrogate shall make an order approving the adoption and directing that the adoptive child shall thenceforth be regarded and treated in all respects as the child of the adoptive parents or parent. . . . Such order shall contain the full name, date and place of birth and reference to the schedule annexed to the petition containing the medical history of the child in the body thereof and may direct that the child's medical history be furnished to the adoptive parents. . . . Such order and all the papers in the proceeding shall be filed in the office of the court granting the adoption and the order shall be entered in books which shall be kept under seal and which shall be indexed by the name of the adoptive parents and by the full original name of the child. Such order, including orders heretofore entered, shall be subject to inspection and examination only as hereinafter provided. . . . If the confidentiality is violated, the person or company violating it can be found guilty of contempt of court. . . .

No person, including the attorney for the adoptive parents shall disclose the surname of the child directly or indirectly to the adoptive parents except upon order of the court. No person shall be allowed access to such sealed records and order and any index thereof except upon an order of a judge or surrogate of the court in which the order was

Amendment Due Process and Equal Protection grounds and on the further basis that those statutes impose upon

made or of a justice of the supreme court. No order for disclosure or access and inspection shall be granted except on good cause shown and on due notice to the adoptive parents and to such additional persons as the court may direct.

N.Y. Pub. Health Law § 4138:

1. A new certificate of birth shall be made whenever:

. . . .

(c) notification is received by, or proper proof is submitted to, the commissioner from or by the clerk as aforesaid of a judgment, order or decree relating to the adoption of such person. Such judgment, order or decree shall also be sufficient authority to make a new birth certificate with conforming change in the name of such person on the birth certificate of any of such person's children under the age of eighteen years whose record of birth is on file in the state health department . . . .

. . . .

3. (a) When a new certificate of birth is made the commissioner shall substitute such new certificate for the certificate of birth then on file, if any, and shall send the registrar of the district in which the birth occurred a copy of the new certificate of birth. The registrar shall make a copy of the new certificate for the local record and hold the contents of the original local record confidential along with all papers and copies pertaining thereto. It shall not be released or otherwise divulged except by order of a court of competent jurisdiction.

(b) Thereafter, when a verified transcript or certification of birth of such person is issued by the registrar, it shall be based upon the new certificate, except when an order of a court of competent jurisdiction shall require the issuance of a verified transcript of certification based upon the original local record of birth.

4. The commissioner may make a microfilm or other suitable copy of the original certificate of birth and all papers pertaining to the new certificate of birth. In such event, the original certificate and papers may be destroyed. All undestroyed certificates and papers and copies thereof shall be confidential and the contents thereof shall not be released or otherwise divulged except by order of a court of competent jurisdiction.

(footnote continued)

them badges or incidents of slavery in violation of the Thirteenth Amendment. The United States District Court

5. Thereafter, when a certified copy or certified transcript of the certificate of birth of such a person, or a certification of birth for such person is issued, it shall be based upon the new certificate of birth, except when an order of a court of competent jurisdiction shall require the issuance of a copy of the original certificate of birth.

. . . .

7. Whenever the commissioner makes a new birth certificate for any person pursuant to the provisions of subdivision one of this section, he shall forward to such person, if eighteen years of age or more, or to the parents of such person, either a certificate of registration of birth or a certification of birth, whichever he deems appropriate under the circumstances, without making any charge therefor.

N.Y. Soc. Serv. Law § 372:

1. Every court, and every public board, commission, institution, or officer having powers or charged with duties in relation to abandoned, delinquent, destitute, neglected or dependent children who shall receive, accept or commit any child shall provide and keep a record showing:

(a) the full and true name of the child,

(b) his sex and date and place of birth, if ascertainable, or his apparent age,

(c) the full and true names and places of birth of his parents, and their actual residence if living, or their latest known residence, if deceased or whereabouts unknown and the name and actual residence of any other person having custody of the child, as nearly as the same can reasonably be ascertained,

(d) the religious faith of the parents and of the child,

(e) the name and address of any person, agency, institution or other organization to which the child is committed, placed out, boarded out, or otherwise given into care, custody or control,

(f) the religious faith and occupation of the head or heads of the family with whom the child is placed out or boarded out and their relationship, if any, to the child,

(g) if any such child shall die, the date and cause of death and place of burial,

(h) any further disposition or change in care, custody or control of the child,

(i) the date or dates of reception and of any subsequent disposition or change in care, custody or control and, in

for the Southern District of New York, Milton Pollack, Judge, dismissed appellants' complaint against represen-

case of adoption, the name and title of the judge or surrogate making the order of adoption, the date of such order and the date and place of filing of such order,

(j) the reasons for any act performed in reference to such child herein required to be recorded, together with such further information as the department may require; and shall make to the department upon blanks provided by the department reports of each such child placed out, or boarded out, containing the information herein required to be kept; and shall furnish such information to any authorized agency to which any such child shall be committed or otherwise given into custody.

. . . .

3. Upon application by a parent, relative or legal guardian of such child or by an authorized agency, after due notice to the institution or authorized agency affected and hearing had thereon, the supreme court may by order direct the officers of such institution or authorized agency to furnish to such parent, relative, legal guardian or authorized agency such extracts from the record relating to such child as the court may deem proper. The department through its authorized agents and employees may examine at all reasonable times the records required by this section to be kept.

4. All such records relating to such children shall be open to the inspection of the board and the department at any reasonable time, and the information called for under this section and such other data as may be required by the department shall be reported to the department, in accordance with the regulations of the department. Such records kept by the department shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination by any person other than one authorized, by the department, by a judge of the court of claims when such records are required for the trial of a claim or other proceeding in such court or by a justice of the supreme court after a notice to all interested persons and a hearing, to receive such knowledge or to make such inspection or examination. No person shall divulge the information thus obtained without authorization so to do by the department, or by such judge or justice.

. . . .

6. The provisions of this section as to records and reports to the department shall apply also to the placing out, adoption or boarding out of a child and the acceptance of guardianship or of surrender of a child.

tative record keepers and surrogates represented by the State of New York and certain adoption agencies or societies. *Alma Society, Inc. v. Mellon,* 459 F. Supp. 912 (S.D.N.Y. 1978). We affirm.[2]

Appellants argue that adult adoptees should be given access to the records of their adoptions with no showing of cause whatsoever. Their supporting affidavits, which we must take as true for present purposes, indicate that lack of access to such records causes some of them serious psychological trauma and pain and suffering, may cause in them or their children medical problems or misdiagnoses for lack of history,[3] may create in some persons a consciousness of danger of unwitting incest, and in others a "crisis" of religious identity or what they feel is an impairment of religious freedom because they are unable to be reared in the religion of their natural parents. Appellants point out that only in the last fifty years has New York had sealed adoption records,[4] that Scotland and Israel have had open records for some time,[5]

2 Appellees Children's Aid Society and Louise Wise Services argue that we should invoke the doctrine of abstention under (1) *Younger v. Harris,* 401 U.S. 37 (1971), and progeny, (2) under *Railroad Comm'n v. Pullman Co.,* 312 U.S. 496 (1941), and (3) because this is a domestic relations matter. We disagree for the reasons so well stated by Judge Pollack, and we do not repeat his opinion. *See Alma Society, Inc. v. Mellon,* 459 F. Supp. 912, 914-15 (S.D.N.Y. 1978).

3 In *Rhodes v. Laurino,* No. 78-7243, handed down herewith, such a claim is made.

4 From 1873 to 1924 adoption records in New York were public. Several states still grant the adoptee access to original birth certificates, *e.g.,* 16 Ala. Code § 26-10-4 (1975); 14A Fla. Stat. Ann. § 382.22 (West Supp. 1978); 5 Kan. Stat. § 65-2423 (1972); or to the court records of their adoption. 9 S.D. Compiled Laws Ann. § 25-6-15 (1977).

5 Scotland for 48 years, Adoption of Children (Scotland) Act, 1930, 20 & 21 Geo. V, c. 37, § 11(8) (adoptee at age 17); Israel

and that England and Wales have recently changed from closed to open records with access to adults who have obtained a certain age.[6]

The attack upon the New York statutes is three-fold. Appellants first argue that the interest of an adult adoptee in learning from the State (or from agencies acting under compulsion of state law) the identity of his natural family is a fundamental right under the Due Process clause of the Fourteenth Amendment. "This section affords not only a procedural guarantee against the deprivation of 'liberty,' but likewise protects substantive aspects of liberty against unconstitutional restrictions by the State." *Kelley v. Johnson,* 425 U.S. 238, 244 (1976); *see Castaneda v. Partida,* 430 U.S. 482, 503 n.2 (1977) (Marshall, J., concurring) (recognizing impact of discrimination on "sense of self"). *See also Moore v. City of East Cleveland,* 431 U.S. 494 (1977) (impact of housing ordinance on family relationship).

Second, appellants argue that adult adoptees constitute a suspect or "quasi-suspect" classification under the Equal Protection clause of the Fourteenth Amendment.[7] Under this view semi-strict or intermediate scrutiny of the New

for 18, Adoption of Children Law 5720-1960, No. 45, § 27(3), 14 Laws of the State of Israel 93, 97 (1960) (adoptee at age 18).

6 The Children Act, 1975, c. 72, § 26 (adoptee at age 18), amending the Adoption Act, 1958, 7-8 Eliz. II, c.5, § 20(5). *See* Levin, Tracing the Birth Records of Adopted Persons, 7 J. Fam. L. 104 (1977).

7 Appellants speak in terms of a "suspect class," relying on *Trimble v. Gordon,* 430 U.S. 762, 767 (1977) (illegitimacy "analogous to" suspect class, but not sufficiently so as to require "our most exacting scrutiny"), and arguing that the sealed records laws treat them worse than illegitimates. *See also Mathews v. Lucas,* 427 U.S. 495, 505, 506, 510 (1976); *Craig v. Boren,* 429 U.S. 190, 210-11 n.* (1976) (Powell, J., concurring). Professor Tribe has put it:

(footnote continued)

York statutes would be appropriate, and appellants maintain that such a review does not indicate that the statutes are based on sufficiently important state interests.

Finally, appellants argue that the Thirteenth Amendment also applies to this case because the statutes that require sealing of the adoption records as to adults constitute the second of the five incidents of slavery—namely, the abolition of the parental relation—listed by Senator James Harlan of Iowa in a speech made during the deliberations on the Thirteenth Amendment. *See* 1 B. Schwartz, *Statutory History of the United States: Civil Rights* 71, 72 (1970). Furthermore, appellants say, none of the exceptions to the Thirteenth Amendment[8] covers

---

> Although indicating that he "would not welcome a further subdividing of equal protection analysis," Justice Powell, concurring in *Craig v. Boren*, acknowledged that "[t]here are valid reasons for dissatisfaction with the 'two-tier' approach that has been prominent in the Court's [equal protection] decisions in the past decade," and added that "candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification." The Justice might well have added that a growing range of cases, involving classifications other than gender and involving a number of important but not "constitutionally fundamental" interests, have likewise triggered forms of review poised between the largely toothless invocation of minimum rationality and the nearly fatal invocation of strict scrutiny—intermediate forms of review which Justice Powell must have had in mind when he spoke of "sharper focus."
>
> L. Tribe, *American Constitutional Law* § 16-30, at 1082 (1978) (footnotes omitted).

8 There are at least six recognized exceptions. The Amendment itself describes the first, punishment for crime. *Robertson v. Baldwin*, 165 U.S. 275, 282 (1897), cites three others; the "service" exceptions include sailor's contracts, military and naval service, and "the right of parents and guardians to the custody of their minor children or wards." The fifth exception is "the obligations . . . of an apprentice to his master." *Bailey v. United*

appellants as adults. Under appellants' view, the rights that the Thirteenth Amendment guarantees are not subject to balancing but are instead protected absolutely. We will discuss each of appellants' three arguments in turn.

Substantive Due Process

What appellants assert is a right to "personhood."[9] They rely on a series of Supreme Court cases involving familial relationships, rights of family privacy, and freedom to marry and reproduce.[10] As they put it, "an adoptee is someone upon whom the State has, by sealing his records, imposed lifelong familial amnesia . . . injuring the adoptee in regard to his personal identity when he was too young to consent to, or even know, what was happening." The district court considered that intrusions on privacy are justifiable in the public interest, 459 F. Supp. at 916, but that the natural parent has a countervailing right of privacy and right to be let alone, *citing Stanley v. Georgia*, 394 U.S. 557 (1969). The court also referred to the right of privacy of the adopting parents, presumably referring to "the disruption caused by locating their adoptive child's natural parents." 459 F. Supp. at 916.

States, 219 U.S. 219, 243 (1911); *Clyatt v. United States*, 197 U.S. 207, 216 (1905). The sixth is compulsory work on public roads. *Butler v. Perry*, 240 U.S. 328 (1916).

9 The term "personhood" originated with Professor Freund as an alternative to "autonomy" or "privacy" and was in turn adopted by the late Judge Craven of the Fourth Circuit. *See* Craven, *Personhood: The Right to be Let Alone*, 1976 Duke L.J. 699, 702 & n.15.

10 The cases are collected in I N. Dorsen, P. Bender & B. Neuborne, *Emerson, Haber & Dorsen's Political and Civil Rights in the United States*, ch. XII, § A (4th ed. 1976); II N. Dorsen, P. Bender, B. Neuborne & S. Law, *Emerson, Haber & Dorsen's Political and Civil Rights in the United States*, ch. XXXIII (4th ed. 1979).

We could readily take a "pigeon-hole" approach and in doing so, because appellants' novel claims do not fit into any as yet recognized category of "privacy," exclude them. For example, there is not involved a general "individual interest in avoiding disclosure of personal matters," *Whalen v. Roe,* 429 U.S. 589, 599 (1977). Although it could be argued that appellants do have an "interest in independence in making certain kinds of important decisions," *id.* at 599-600,[11] that categorization still would leave the question whether in a situation involving both natural parents and adoptive parents the adult adoptee should have "independence" in determining whether he or she shall obtain knowledge of the natural parents. So, too, with a categorization of privacy as including "repose, sanctuary, and intimate decision," *see Comment, A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision,* 64 Cal. L. Rev. 1447 (1976), or incorporating the rather vague concepts of "autonomy," "intimacy," and "identity." *See* Gerety, *Redefining Privacy,* 12 Harv. C.R.C.L. L. Rev. 233, 236, 268 (1977); *see generally* L. Tribe, *American Constitutional Law* § 15-2 (1978).

We think that it advances analysis, however, to examine more closely the character of the choices and information that we are asked to treat as special and the factual framework of the decision that we are asked to render. *See id.* § 15-1, at 887. We note, of course, that we are dealing with the "family" in general and with two families in particular—first, the natural parent(s) who has (have) surrendered custody of the adoptee child to the

11 The Court enumerated these decisions in *Paul v. Davis,* 424 U.S. 693, 713 (1976), as "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." Appellants presumably base their claim on "family relationships."

State and in turn an agency or other family, and second, the adopting family which has, presumably, nurtured the child to the age of adulthood. The adoptee's attainment of majority is a definite event in the adoptee's life; but it occurs independent of either the legally terminated natural family relationship or the legally assumed adoptive one and does not affect termination or continuation of those relationships. The information sought is information as to the identity of the real parent(s) that was concealed from one and all upon adoption as a matter of law and that may indeed have been a consideration in the willingness of the real parent(s) to give up the child for adoption. With this factual background two recent Supreme Court cases have a bearing upon our deliberations.

The first of these is *Quilloin v. Walcott,* 434 U.S. 246 (1978). There the appellant, the natural father of an illegitimate child, sought to prevent the husband of the child's mother from adopting the child although the natural father had never attempted to legitimate the child who had always been in the mother's custody. The Court held that the application of a "best interests of the child" standard did not violate appellant's substantive rights under the Due Process clause. The Court noted its recognition that the relationship between parent and child is constitutionally protected, referring to *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Stanley v. Illinois,* 405 U.S. 645 (1972); and *Meyer v. Nebraska,* 262 U.S. 390 (1923). It also noted its own recognition in *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944), that "the custody, care and nurture of the child reside first in the parents." The Court expressed "little doubt" that the State's attempt "to force the break-up of a natural family, over the objections of parents and children, without some

showing of unfitness" would violate the Due Process Clause, *citing Smith v. Organization of Foster Families for Equality & Reform,* 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring). But the Court emphasized that "the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant." 434 U.S. at 255.

Of course *Quilloin* is distinguishable from the case at bar because there a natural father who had never sought nor had actual or legal custody of a child was seeking to prevent adoption, while here the child himself—now an adult—is seeking information. But the relevance of the case is the Court's "full recognition [of] a family unit already in existence." *Id.* And even though appellants are adults we must assume that they are still part of their adoptive families, families still in existence as to each of them which might be adversely affected by the release of information as to the names of natural parents or the unsealing of the adoption records. At least it would seem that there is an interest on the part of the *adopting* parents that is of recognized importance, one that, however, they surely can waive if they see fit to do so.[12]

In *Zablocki v. Redhail,* 434 U.S. 374 (1978), the second recent case, a majority of the Court held that the right to marry, a "fundamental" interest under the Equal Protection Clause, was abridged by a statute requiring court permission to marry where the applicant has minor issue not in his custody and whom he is under obligation to support. The "right to marry" was said to be "of fundamental importance for all individuals," 434 U.S. at 384,

12 We note that N.Y. Dom. Rel. Law § 114, *supra* note 1, requires that a court acting upon a request for disclosure shall notify the adoptive parents of the proceedings.

and "part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." *Id.* The Court quoted the references in *Griswold v. Connecticut,* 381 U.S. 479, 486 (1965), to marriage as "coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred" as well as "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." Thus the Court held in *Zablocki* that the decision to marry was "among the personal decisions protected by the right of privacy." 434 U.S. at 384. *See also Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639-40 (1974) ("freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause"). The *Zablocki* Court went on to say:

> The woman whom appellee desired to marry had a fundamental right to seek an abortion of their expected child . . . or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy bring . . . . Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection.

Id. at 386.

Again, although *Zablocki* is not directly pertinent to this case, it does recognize that we must look to the nature of the relationships and that choices made by those other than the adopted child are involved. Under all the applicable precedents, the State may take these choices into consideration and protect the natural mother's choice of privacy which not all have forsaken even if appellants are correct, as we are told, that many

mothers would be willing in this day and age to have their adult adopted children contact them.[13] So, too, a state may take into account the relationship of the adopting parents, even if, as appellants assert, many of them would not object to or would even encourage the adopted child's seeking out the identity of or relationship with a natural parent. The New York statutes in providing for release of the information on a "showing of good cause" do no more than to take these other relationships into account. As such they do not unconstitutionally infringe upon or arbitrarily remove appellants' rights of identity, privacy, or personhood. Upon an appropriate showing of psychological trauma, medical need, or of a religious identity crisis—though it might be doubted upon a showing of "fear of unconscious incest"—the New York courts would appear required under their own statute to grant permission to release all or part of the sealed adoption records.[14]

Equal Protection

Appellants begin their equal protection analysis with the argument that adult adoptees are a suspect classification (and the correlative argument that the State has no compelling interests to support the validity of the sealed records laws). Appellants refer us to *Trimble v. Gordon*, 430 U.S. 762, 766 (1977), where the Court stated that classifications based on illegitimacy fall in a "realm of less than strictest scrutiny" although the scrutiny "is not a

13 Appellants cite to us one study indicating that 128 out of 152 natural families selected at random agreed to meet an adult adoptee. Jones, The Sealed Adoption Record Controversy: Report of a Survey of Agency Policy, Practice and Opinion (1975).

14 The courts concededly have done so from time to time.

toothless one."[15] By the citation of *Trimble*, appellants suggest that they are at least entitled to the same level of constitutional scrutiny as illegitimates who have been termed a "sensitive" or quasi-suspect category for which the appropriate level of scrutiny is "intermediate," not "strict," *see* L. Tribe, *supra*, §§ 16-30, -31. But appellants cite us to no case holding that *adoptees* are a "sensitive" or quasi-suspect classification. Instead they argue that because the overwhelming majority of adoptees adopted by nonrelatives are illegitimate and because, they say, the State actually treats adoptees *worse* than nonadopted illegitimates, who at least know who their natural mothers are or were and often their natural fathers as well, strict scrutiny is the applicable standard of analysis under the Equal Protection Clause. Of course, as Professor Gunther has said, scrutiny that is "'strict' in theory" is usually "fatal in fact," *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972). Second, appellants argue for application of "strict scrutiny" on the basis of suspect classification status under the Thirteenth Amendment on the theory that "[a]ny group upon which a State imposes . . . a badge or incident of slavery is *ipso facto* also a suspect category under the Equal Protection Clause."

We are not persuaded that strict or even intermediate scrutiny is the appropriate standard of review in this case. Appellants' second strict scrutiny argument requires little discussion. The Supreme Court has been loathe to expand the list of traits subject to this most rigorous

15 The *Trimble* Court was referring to the standard of scrutiny set forth in *Mathews v. Lucas*, 427 U.S. 495, 505, 506, 510 (1976).

level of review,[16] and we are confident that the Court would not include a trait simply because it is a "badge or incident of slavery." Here, indeed, we cannot even conclude that the State has subjected appellants to such a "badge or incident," as the subsequent section of our opinion explains.

Appellants' first argument for strict scrutiny, although more plausible, is also flawed. Simply because most adult adoptees are allegedly illegitimates, it does not follow that adoptees are subject to the same level of constitutional scrutiny as illegitimates, much less a greater level.[17] Moreover, there is a more fundamental, structural defect in the argument that discrimination between adult adoptees (who gain access to their adoption records only upon good cause) and non-adopted illegitimates (who will usually have ready access to the information that adoption records contain) is quasi-suspect. When a court decides that a classification is suspect or quasi-suspect, it has concluded that the State has employed a questionable trait to distinguish those whom the law should burden from those whom the law should not. Here, however, the distinguishing trait between adult adoptees and non-adopted illegitimates, the allegedly similarly situated classes, is not illegitimacy—indeed, *both* of these classes are largely comprised of illegitimates, according to appellants. The trait, rather, is adopted status.

16 *See, e.g., Frontiero v. Richardson,* 411 U.S. 677 (1973); *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1 (1973).

17 Appellant's argument appears to invoke disproportionate impact analysis. But the Supreme Court has held, in the context of racial discrimination, that the disproportionate impact of state action upon a suspect class does not, by itself, warrant strict scrutiny. *Washington v. Davis,* 426 U.S. 229 (1976). Similarly, the disproportionate impact of New York's policy upon illegitimates does not by itself warrant the intermediate scrutiny that an explicit discrimination against illegitimates would justify.

Appellants present no arguments in favor of treating classifications by adopted status as even quasi-suspect, entitled to an intermediate level of judicial scrutiny. Discrimination against illegitimates is generally so treated because of the illogic and injustice of stigmatizing a child in order to express disapproval of the parents' liaisons. *Mathews v. Lucas,* 427 U.S. 495, 505 (1976), *quoting Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 (1972). This rationale is less apposite to discrimination against adopted persons. If adopted persons experience social stigma, it is not as intense or pervasive as illegitimates suffer. Moreover, the present statute notwithstanding, the adopted are not generally subject to extensive legal disabilities and thus have less of a claim to judicial protection than illegitimates.

Even assuming that the classification here were subject to intermediate scrutiny,[18] it would not violate equal protection; for we conclude that it is substantially related to an important state interest. *See Craig v. Boren,* 429 U.S. 190, 197 (1976). As noted above, appellants argue that they are similarly situated to non-adopted illegitimates. By their claim to suspect status, appellants apparently argue in the alternative that adopted persons should be compared to non-adopted persons generally. The question, in either case, is whether the two classes are sufficiently different with respect to an important governmental interest to justify

18 In arguing that the adoptees here are an even more "suspect" group than illegitimates, appellants allege that adoptees are treated more unfairly than illegitimates because adoptees do not know their natural parents' identities. To the extent that this argument emphasizes appellants' interest in securing that knowledge, it is better understood as an argument for fundamental interest status than for suspect category status. But we do not believe that such an interest should be considered fundamental, largely for the reasons given in our discussion of the substantive due process argument. Even if the interest is "quasi-fundamental" and subject to intermediate scrutiny, the classification is not invalid, as the text *infra* indicates.

treating the two classes differently.[19] In evaluating this question under the intermediate level of review we must, as in the case of rational basis scrutiny, look to the current articulation of the rationale of the statute as advanced by the appellants themselves, *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 314 & n.6 (1976) (per curiam); *Johnson v. Robison,* 415 U.S. 361, 376 (1974). We must be sure that the rationale advanced is not simply an afterthought supplied purely by hindsight. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 653 (1974) (Powell, J., concurring). Rather, we must look to the actual purposes of the statute, *Weinberger v. Wiesenfeld,* 420 U.S. 636, 648 n.16 (1975); *see also Eisenstadt v. Baird,* 405 U.S. 438, 448-49 (1972), and we must ensure that the individual has the opportunity to rebut any overbroad presumptions that seriously affect the fairness of the scheme. *Craig v. Boren, supra,* 429 U.S. at 199; *Cleveland Board of Education v. LaFleur, supra; Crawford v. Cushman,* 531 F.2d 1114, 1123-26 (2d Cir. 1976).

Judged by these standards, the New York sealed record statutes do not want constitutional validity. The statutes, we think, serve important interests. New York Domestic Relations Law § 114 and its related statutes represent a considered legislative judgment that the confidentiality statutes promote the social policy underlying adoption laws. *See In re Anonymous,* 89 Misc.2d 132, 133, 390 N.Y.S.2d 779, 781 (Surr. Ct. 1976). Originally, sealing adoption records was discretionary with the court, 1924 N.Y. Laws, ch. 323, § 113, but in 1938 confidentiality of adoption records became mandatory. 1938 N.Y. Laws, ch. 606 § 114. As late as 1968, the legislature enacted various amendments to increase the assurance of confidentiality. 1968

19 *See generally* Note, *Equal Protection: A Closer Look at Closer Scrutiny,* 76 Mich. L. Rev. 771, 774, 814-21 (1978).

N.Y. Laws, ch. 1038. Moreover, the purpose of a related statute, Section 4138 of the Public Health Laws, was to erase the stigma of illegitimacy from the adopted child's life by sealing his original birth certificate and issuing a new one under his new surname. And the major purpose of adoption legislation is to encourage natural parents to use the process when they are unwilling or unable to care for their offspring. New York has established a careful legislative scheme governing when adoption may occur and providing for judicial review, to encourage and facilitate the social policy of placing children in permanent loving homes when a natural family breaks up. As the court of appeals stated in *Scarpetta v. Spence-Chapin Adoption Service,* 28 N.Y.2d 185, 195, 321 N.Y.S.2d 65, 73, *cert. denied,* 404 U.S. 805 (1971), "[i]t cannot be doubted that the public policy of our State is contrary to the disclosure of the names and identities of the natural parents and prospective adoptive parents to each other." (Footnote omitted.) Forty-two other states, according to the State of New York, require that birth and adoption records be kept confidential, indicating the importance of the matter of confidentiality. *See also* Uniform Adoption Act (U.L.A.) § 16(2) (rev. 1969) (adoption records "are subject to inspection only upon consent of the Court and all interested persons; or in exceptional cases, only upon an order of the Court for good cause shown"). These significant legislative goals clearly justify the State's decision to keep the natural parents' names secret from adopted persons but not from non-adopted persons.

To be sure, once an adopted child reaches adulthood, some of the considerations that apply at the time of adoption and throughout the child's tender years no longer apply or apply with less force. Illegitimacy might stigmatize an adult less than a child, and the goal of encouraging adop-

tion of unwanted and uncared for children might not be significantly affected if *adult* adoptees could discover their natural parents' identities. But the state does have an interest that does not wane as the adopted child grows to adulthood, namely, the interest in protecting the privacy of the natural parents. "[T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights . . . ." *Smith v. Organization of Foster Families for Equality & Reform,* 431 U.S. 816, 845 (1977) (footnote omitted) (examining the right of a natural family to the return of its child from the care of a foster family). Whether or not the State's interest is "compelling," as the court in *Mills v. Atlantic City Department of Vital Statistics,* 148 N.J. Super. 302, 372 A.2d 646, 653 (Super. Ct. Ch. Div. 1977), and the court below, 459 F. Supp. at 917, suggested, it is an important interest, and one which justifies keeping the records confidential regardless of the adopted child's age.

We also believe that the statutory classification is "substantially" related to this interest. To be sure, the law is somewhat overinclusive; for some natural parents undoubtedly would not object to revealing their identities to their children, and some adult adoptees have an extraordinary need for their records that might outweigh their natural parents' need for privacy. But a law does not violate equal protection simply because it results in overinclusion or underinclusion, *i.e.*, some "misfit." The question, rather, is whether the differences between those burdened and those not burdened by a law are substantial enough to justify treating the two classes differently.[20] Here, the legislature has not unreasonably concluded that a larger proportion of the natural parents of adopted children than of non-adopted children would want to keep their identities

20 *See id.*

private. That is enough to make the statutory classification constitutional.

Moreover, we note that the provision for release of adoption records "on good cause shown" substantially mitigates the possible overbreadth of the statute. The New York courts have granted access for aid in psychiatric or psychological treatment, *In re "Anonymous,"* 92 Misc.2d 224, 399 N.Y.S.2d 857 (Surr. Ct. 1977); *In re Maxtone-Graham,* 90 Misc.2d 107, 393 N.Y.S.2d 835 (Surr. Ct. 1975), and for information about genetic conditions. *In re Chattman,* 57 A.D.2d 618, 393 N.Y.S.2d 768 (1977). Thus this case presents an entirely different situation from what it would have if the State permitted no access on any ground. The permitted showing of good cause promotes individualized treatment, a form of structural justice. *See Crawford v. Cushman, supra;* L. Tribe, *supra,* ch. 17. Appellants do not suggest that the New York courts have been overly reluctant to find good cause; we certainly must assume the contrary. Indeed, the cases to which the parties have referred us indicate that some New York courts have appropriately recognized good cause in a variety of circumstances. We find, in short, no basis, even under the intermediate scrutiny standard, for holding that the New York statutes violate the Equal Protection Clause.

Thirteenth Amendment

Appellants make the novel argument, one concededly not based on the decided cases, that the Thirteenth Amendment's prohibition of slavery and involuntary servitude gives them an *absolute* right to release of their adoption records. Appellants first assert that what rights the Thirteenth Amendment protects it protects absolutely, that is, there is no balancing test and no interest of any kind that can preclude enforcement of the proscriptions where they apply. Second, appellants assert that the Thirteenth Amend-

ment does in fact apply here. The argument is, as we have suggested, that in abolishing slavery and involuntary servitude the Framers also intended to abolish five "necessary incidents of slavery." We address only the second point because we find that the Amendment is entirely inapplicable to this case.

Appellants refer us particularly to the speech of Senator James Harlan of Iowa of April 6, 1864, in which he set forth a number of such incidents. The second named was

> the abolition practically of the parental relation, robbing the offspring of the care and attention of his parents, severing a relation which is universally cited as the emblem of the relation sustained by the Creator to the human family. And yet, according to the matured judgment of these slave States, this guardianship of the parent over his own children must be abrogated to secure the perpetuity of slavery.

1 B. Schwartz, *supra*, at 72. Appellants go so far as to say that the New York sealed record system is "less humane" than New Mexico peonage, under which system a child contracted into peonage ceased to be bound upon obtaining the age of majority, *see Jaremillo v. Romero*, 1 N.M. 190 (1857), because New York adoptees are subject to a "*lifelong* denial of knowledge of their natural origins." Appellants liken their situation also to that of the antebellum South where a slave child was "sold off" while too young to remember his parents and grew up separated from them by inability to communicate as well as by distance. The analogy according to appellants is that however literate they may be, they cannot write to their natural parents, cannot visit them, and thereby wear a "badge or incident" of slavery.

This Thirteenth Amendment argument simply does not conform to the Supreme Court's interpretations of the Thirteenth Amendment. The Court has never held that the Amendment itself, unaided by legislation as it is here, reaches the "badges and incidents" of slavery as well as the actual conditions of slavery and involuntary servitude. *See Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439, 440 (1968); *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896); *The Civil Rights Cases*, 109 U.S. 3, 20-21, 23, 24, 25 (1883); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 69, 72 (1873). Indeed, all indications are to the contrary. Notwithstanding Congress's broad authority to legislate under § 2 of the Amendment, *Palmer, supra; Jones, supra; The Civil Rights Cases*, 109 U.S. at 20-21, the Court has directly invoked the Amendment only to strike down state laws imposing the condition of peonage. *See Pollock v. Williams*, 322 U.S. 4 (1944); *Bailey v. Alabama*, 219 U.S. 219 (1911). Moreover, the Court has indicated that for purposes of judicial enforcement under the express prohibition of the Amendment itself—"[n]either slavery nor involuntary servitude . . . shall exist"—the Court will define "slavery" narrowly. *Palmer, supra*. Abolition of the badges and incidents the Court has left to Congress.

Appellants do not argue that the denial of complete access to and disclosure of their adoption records constitutes the imposition of slavery or involuntary servitude. Rather, appellants' argument is that "New York's sealed records laws impose upon them [an] incident of slavery" and that "[t]he Thirteenth Amendment . . . all by itself and without any aid from an act of Congress abolished and destroyed 'the incidents of slavery.'" The decided cases show that we must reject this absolutist view of the Thirteenth Amendment. Even as the first Mr. Justice Harlan dissented in

Plessy v. Ferguson, supra, on the ground that the Louisiana statute which required separate railway accommodations for white and black passengers infringed "the personal liberty," 163 U.S. at 557, guaranteed under the Thirteenth, Fourteenth, and Fifteenth Amendments, he indicated that the Thirteenth Amendment alone could not have required such a result. Although he wrote that the Amendment "prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude," *id.* at 555, still he did not adopt the absolutist position urged herein. Rather, he stated that the Amendment was "inadequate to the protection of the rights of those who had been in slavery"; and so "it was followed by the Fourteenth Amendment." *Id.* If the Thirteenth Amendment had by its own force and effect abolished all badges and incidents, all vestiges, of slavery, it would not have been inadequate. So, too, in his dissent in *The Civil Rights Cases, supra,* Mr. Justice Harlan advanced the position not that the Thirteenth Amendment itself had abolished the "burdens and disabilities which constitute badges of slavery and servitude," 163 U.S. at 35, but that Congress had the authority under its power to eradicate the badges and incidents to require equal accommodations.

The problem, then, with appellants' argument is that it proves too much. Abolition under the Amendment itself of all of the "incidents" to which Senator Harlan referred would incorporate into the Thirteenth Amendment the privacy interests in the conjugal and parental relation, the right to hold property, the right to bring suit in court, the right to testify, freedom of speech and of the press, and the right to an equal education. *See* 1 B. Schwartz, *supra,* at 72-74. Such a result would be inconsistent with the explicit or implicit rationale of many Supreme Court cases dealing with these rights. The Court would not have had to incorporate the First Amendment in the Fourteenth to make

it applicable to the States in, *e.g, Fiske v. Kansas,* 274 U.S. 380 (1927), or *Near v. Minnesota,* 283 U.S. 697 (1931), if the Thirteenth Amendment had already done so; nor in fact would state action be required for a First Amendment violation, *see Hudgens v. NLRB,* 424 U.S. 507, 513 (1976), because the Thirteenth Amendment reaches private conduct. *See Griffin v. Breckenridge,* 403 U.S. 88, 104-05 (1971); *Jones v. Alfred H. Mayer Co., supra.* The Court's privacy decisions, *see* notes 9-10 and accompanying text *supra,* would have rested on the Thirteenth Amendment and not some combination or penumbra of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments, *see Griswold v. Connecticut,* 381 U.S. 479, 484-86 (1965); and, perhaps, there would have been no dispute over the equal funding of public school systems. *See San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973). Moreover, appellants' absolutist view of the Thirteenth Amendment would render largely superfluous the Due Process and Equal Protection Clauses of the Fourteenth Amendment as well as the civil rights statutes now codified at 42 U.S.C. §§ 1981 *et seq.* We are appropriately reluctant to reach such a result. The Supreme Court has never considered that the "badges or incidents" went beyond those listed in the 1866 Civil Rights legislation, *viz.,* a lack of "'the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.'" *Jones v. Alfred H. Mayer Co., supra,* 392 U.S. at 441 n.78, *citing The Civil Rights Cases, supra,* 109 U.S. at 22; *see Griffin v. Breckenridge, supra.*

As an additional matter, we point out the doubtful applicability of the second incident of slavery, upon which appellants rely, to the sealed records laws. Although it is doubtless true that an "incident" of slavery (in the original sense)

was the abolition of the parental relation, *i.e.*, the offspring of a slave was deprived of the care and attention of parents, *see* 1 B. Schwartz, *supra,* the New York sealed records laws do not deprive appellants of their parental relation. It is the New York adoption laws themselves and not the sealed records laws that recognize the divestment by natural parents of their guardianship because of formal surrender, abandonment, or forfeiture by unfitness or jeopardy of the child's best interests; and it is the adoption laws that create a new parent-child relationship between appellants and their adoptive parents. Appellants do not challenge the constitutionality of the adoption laws; thus their challenge to the sealed records laws, even if cognizable under the Thirteenth Amendment in the absence of congressional legislation, is misdirected. Appellants are left to their remedies under the New York statute or with the New York legislature.

Judgment affirmed.

3128

570—6-26-79 • USCA—4391

RECORD PRESS, INC., 157 Chambers St., N.Y. 10007, (212) 243-5775

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of June one thousand nine hundred and seventy-nine.

Present:

HON. J. EDWARD LUMBARD

Circuit Judge

HON. JAMES L. OAKES

Circuit Judge

HON. CHARLES L. BRIEANT

District Judge

78-7593

THE ALMA SOCIETY, INC.,

Plaintiffs-Appellants,

v.

IRVING MELLON, ET AL.,

Defeandants-Appellees.

78-7593.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said

District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

A. DANIEL FUSARO,

Clerk

BY: Arthur Heller,

Deputy Clerk

APPENDIX C

Cite as 459 F.Supp. 912 (1978)

912

The ALMA SOCIETY INCORPORATED et al., Plaintiffs,

v.

Irving MELLON, Director of Vital Records, City of New York, et al., Defendants.

No. 77 Civ. 2527(MP).

United States District Court, S. D. New York.

Nov. 2, 1978.

913

Cyril C. Means, Jr., New York City, for plaintiffs.

Charles L. Brody, Asst. Atty. Gen. of the State of New York, New York City, Beryl M. Kuder, Asst. Corp. Counsel of the City of New York, New York City, for defendant Officials.

Polier, Tulin, Clark & Neff by Stephen Wise Tulin, New York City, for defendant Louise Wise Services.

Simpson, Thacher & Bartlett, New York City, by Wesley N. Fach, Jr., Ronald L. Ginns, New York City, for Spence-Chapin Services.

Webster & Sheffield, New York City, by David A. Hom, Donald J. Cohn, New York City, for Children's Aid Society.

Bodell & Magovern, New York City, by Gerald E. Bodell, New York City, for Jewish Child Care Association of N.Y. and New York Foundling Hospital.

Buttenwieser & Josephs, New York City, Helen L. Buttenwieser, New York City, Court-appointed Law Guardian.

459 F. Supp. at 913-914

DECISION

POLLACK, District Judge.

The defendants have moved to dismiss the amended complaint herein or in the alternative to abstain from decision until the statutes are interpreted by the state court. For reasons given hereafter, the suit will be dismissed.

The plaintiffs are adults who were adopted as children and now seek access to their original birth certificates, the Court records in their adoption proceedings, and the records of any private agencies involved in their adoptions.

Various New York statutes require that these records be sealed and that access to

914

them be granted only by Court order. Public Health Law, Section 4138; New York City Administrative Code, Section 567-2.0 (original birth certificates); Domestic Relations Law, Section 114 (court records); Social Services Law, Section 372 (agency records).

These statutes are quoted by the plaintiffs at pages 8 to 14 of the amended complaint. Domestic Relations Law, Section 114, in particular requires that an order allowing access to Court records may be granted "on good cause shown."

So far as the Court can determine only one plaintiff, Maxtone-Graham, applied to the state courts for access to her records, which was granted in part.

The defendants are municipal officials who have custody of the original birth certificates of the plaintiffs; Surrogates of the counties in which twelve of the plaintiffs were adopted and in which the Court records in their adoption proceedings are now kept under seal; and five private agencies that handled the adoptions of fourteen of the plaintiffs and that now keep their records of these adoptions under seal.

The plaintiffs argue that adult adoptees should be given access to the records of their adoptions with no showing of cause whatsoever. The present system of requiring a showing of cause and a Court order to gain access, the plaintiffs say, leads to psychological trauma, risk to health due to ignorance of the medical history of the adoptee and his natural ancestors, danger of incest, and a burden on the free exercise of the adoptee's religion.

For these reasons, the plaintiffs urge that the New York statutes violate the First, Fourth, Ninth, Thirteenth and Fourteenth Amendments to the Constitution of the United States. The plaintiffs therefore ask that the Court declare these statutes unconstitutional and enjoin their enforcement against adult adoptees.

There are some threshold procedural questions to be dealt with before the merits of the claims are reached.

[1] 1. Certain defendants argue that the principles of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), require that the complaint be dismissed. The plaintiffs counter that *Younger* applies only when state proceedings in the matter are pending.

The plaintiffs' argument is correct. The Supreme Court wrote in its most recent case construing *Younger* that its principles were involved "when litigation between the same parties and raising the same issues is or apparently soon will be pending in a State Court." *Trainor v. Hernandez*, 431 U.S. 434, 440, 97 S.Ct. 1911, 1916, 52 L.Ed.2d 486 (1977). *See also Maher v. Doe*, 432 U.S. 526, 527, 97 S.Ct. 2474, 2475, 53 L.Ed.2d 534 (1977) (per curiam). That case was remanded to apply the *Younger* doctrine "if a relevant State proceeding was pending." In two of the three cases in which the defendants say that *Younger* was applied where no State proceeding was pending, a State proceeding was indeed pending. *Schacter v. Whalen*, 445 F.Supp. 1376 (S.D. N.Y.1978) (pending administrative proceeding); *Merrick v. Merrick*, 441 F.Supp. 143 (S.D.N.Y.1977) (pending child-support action). In the third case, *Williams v. Williams*, 532 F.2d 120 (8th Cir. 1976), the plaintiff sued a state court judge and sought a declaration that a judgment entered by that judge was unconstitutional and an injunction against its enforcement. The Eighth Circuit held that *Younger* required dismissal because the judgment remained open to collateral attack in state court. Even if *Williams* was a proper extension of *Younger*, it does not apply here because no state judgment has been entered.

[2] 2. It is urged that *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) applies herein. This involves an inquiry focused on the possibility that the state courts may interpret a challenged state statute so as to eliminate or at least alter materially the constitutional question presented.

The defendants argue that if the plaintiffs applied to the state courts for access to

their records, those Courts might construe "good cause" in a way that would allow the plaintiffs to see their records, and therefore that this Court should abstain from deciding the constitutional issues raised by the complaint. In this the defendants rely on *Yesterday's Children v. Kennedy*, 569 F.2d 431 (7th Cir. 1977), in which adult adoptees attacked two Illinois statutes that require a Court order for the release of adoption records and original birth certificates. The Seventh Circuit understood the complaint to allege that these statutes set too high a standard of cause for release of the records to adult adoptees. The Court abstained because the two statutes had been interpreted only once, by a lower court in an unreported opinion, and because it thought that the Illinois Courts might interpret the standard of cause in a way that would meet the plaintiffs' objections.

The plaintiffs reply that they are claiming that *any* requirement of cause whatsoever is unconstitutional, not merely that the New York Courts have set too high a standard. It is "wildly speculative," they say, that the state courts will eliminate any standard of cause for adult adoptees, and any such possibility is too remote to justify abstention.

In the Court's opinion the plaintiffs' claim should be decided here. The New York Courts do require good cause for the release of records to adult adoptees, for example, see *In Re Chattman*, 57 App. Div.2d 618, 393 N.Y.S.2d 768 (2d Dep't 1977); *In Re Maxtone-Graham*, 90 Misc.2d 107, 393 N.Y.S.2d 835 (Sur.Ct.N.Y.Co.1975), and there is no evidence that the New York Courts are about to abandon this requirement. Since the plaintiff claims that any requirement of cause is unconstitutional, the constitutional issues will not likely be eliminated or changed by a new interpretation of state law. As the Attorney General recognizes in his brief, *Pullman* abstention is therefore inappropriate.

3. Certain defendants argue that The Alma Society has no standing and that the plaintiffs who already have received from other sources the information probably contained in their records also have no standing. Since there would remain plaintiffs who have standing even if these did not, the Court does not discuss these arguments.

Summary of Arguments on the Merits

The plaintiffs argue that any requirement of good cause violates the Constitution, first, because it discriminates against adoptees, a suspect classification under the Equal Protection Clause; second, because it infringes the right to privacy in matters of family life; third, because it denies adoptees their right to acquire useful information; and, fourth, because it is a badge or incident of slavery forbidden by the Thirteenth Amendment.

Suspect Classification under Equal Protection

The Supreme Court has identified a suspect class entitled to the protections of strict judicial scrutiny as one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *Mathews v. Lucas*, 427 U.S. 495, 506, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976).

The plaintiffs argue that adoptees are so powerless politically that they require the protection due to discrete and insular minorities. The defendants rely principally on *Mathews, supra*, which held that illegitimacy is not a suspect classification.

Right of Privacy

The plaintiffs appear to argue that the right of privacy accorded by the Supreme Court to certain aspects of family life and procreation, for example, *Moore v. City of East Cleveland*, 431 U.S. 494, 499, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977), also protects their interest in personal identity.

The defendants reply that the plaintiffs' interests are not fundamental enough to warrant this protection.

916

Right to Acquire Useful Information

With respect to the right to acquire useful information, here the defendants rely principally on *Gotkin v. Miller*, 379 F.Supp. 859, 862–63 (E.D.N.Y.1974), *aff'd*, 514 F.2d 125 (2d Cir. 1975).

In *Gotkin*, a former mental patient argued that her right to acquire useful information entitled her to see confidential records of mental hospitals in which she had been confined.

The Court held that the right to acquire useful information was a corollary of the right of free speech and had never been used to compel an unwilling speaker to impart information. The plaintiffs respond that the records sought here are more important to them than the hospital records were to Mrs. Gotkin.

Thirteenth Amendment

With respect to the Thirteenth Amendment, the gist of the plaintiffs' argument is that the requirement of good cause is a badge or incident of slavery because it is the equivalent of the sale and separation from their parents of slave children too young to remember who their parents were.

The defendants reply that nothing like the good cause requirement has been recognized as a badge or incident of slavery and that this argument is frivolous.

Countervailing State Interests

On the subject of countervailing state interests, the defendants argue that even if the plaintiffs had some constitutional right to inspect their records, that right would have to be balanced against the legitimate interests of the state in the confidentiality of these records. These interests include encouraging natural parents, foster parents, and prospective parents to disclose to the adoption agency whatever personal information might help the agency to place the child in a suitable home; assuring the natural parents their privacy in order to encourage them to put their child up for adoption through legal channels rather than on the unofficial black market in adoptions; protecting the privacy of natural parents who have already given their child up for adoption and may not want to be found by their child; and protecting the adoptive family from the disruption caused by locating their adoptive child's natural parents.

It is in order to avoid *Pullman* abstention, as the Court sees it, that the plaintiffs have taken the position that New York can never constitutionally withhold adoption records from adult adoptees.

[3] The Supreme Court has reiterated that the right to privacy may be regulated by the state if such regulation is justified by compelling or state interests. When, as here, no fundamental interest is involved, the statute challenged should be upheld if it is reasonable, not arbitrary, and bears a rational relationship to a permissible state objective.

[4] Indeed, intrusions on the privacy of the individual may be justified in the public interest. The natural parents surrendered a child for adoption with not merely an expectation of confidentiality, but with actual statutory assurance that his or her identity as the child's parent will be shielded from public disclosure. Thus, the natural parent has a right to privacy, a right to be let alone that is not only expressly assured but also has been recognized as a vital interest by the United States Supreme Court, *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

459 F. Supp. at 916-917

The New York statutes and regulations which seal adoption records protect the right to privacy of the adopting parents and that of natural parents from unwarranted intrusion. The State Legislature and the other bodies which have fashioned rules have recognized that this right to privacy also cannot be made absolute, that parties such as the adult adoptees here may have a countervailing interest which may warrant disclosure in spite of assurances of secrecy.

For this reason, the regulations and statutes have provided that upon good cause shown a Court may order that the records be revealed to the party making proper application.

This statutory provision vests in the Court the power to weigh and balance the competing privacy rights and make a determination based on the facts and circumstances of each individual case.

[5, 6] No constitutional or personal right is unconditional and absolute to the exclusion of the rights of all other individuals.

The statutes before the Court do not totally deny plaintiffs access to the information they seek. They only require that they, as members of a class in which there is an overwhelming state interest, must demonstrate good cause in order to protect the countervailing privacy rights of the natural parents. Such a limitation based upon a valid state policy of protecting the rights of others is not an unconstitutional exercise of state power.

459 F. Supp. at 917

In the last analysis, as the Supreme Court has expressly pointed out, "the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual states." *Katz v. United States*, 389 U.S. 347, 350–51, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967) (footnotes omitted).

[7] It is the opinion of this Court that plaintiffs' rights to privacy and to receive important information are not constitutionally abridged by the New York statutes but rather are permissibly limited in accordance with a valid state interest to balance conflicting rights of privacy and to protect the integrity of the adoption process, which is likely to suffer if the assurances of secrecy are not present. Constitutional principles of equal protection do not require that all persons be treated identically.

The state has more than a rational basis; it has a compelling interest in regulating the access sought here.

These views will be recognized almost in *haec verba* as the views also expressed by the New Jersey Court in *Mills v. Atlantic City Department of Vital Statistics*, 148 N.J.Super. 302, 372 A.2d 646 (Ch.Div.1977).

The Court holds that the regulations challenged here are reasonable and appropriate;

the Court accordingly concludes that even if the plaintiffs had made out a constitutional right of access to their records in any circumstances their failure to accommodate the state's interests seems to the Court to require that their complaint be dismissed and accordingly the Court concludes that judgment shall be entered herein dismissing the complaint.

SO ORDERED.

APPENDIX D

The New York State statutes sealing adoption records are printed in Appendix A, footnote 1, at pp. 4a-7a, supra.

This Appendix D prints the provision on sealed adoption records in the New York City Administrative Code.

NEW YORK CITY CHARTER AND ADMINISTRATIVE CODE

ANNOTATED

A complete text of the New York City Charter and the New York City Administrative Code with court decisions from the time of the enactment of the Code and Charter

VOLUME 3

Editor
EDITH L. FISCH
(Member of the New York Bar)

WILLIAMS PRESS, INC.
ALBANY, NEW YORK
1978

§ 567–2.0 **Supplemental birth records.**—a. A new birth record shall be made whenever:

1. Proof is submitted to the department that the previously unwed parents of a person have intermarried subsequent to the birth of such person;

2. Notification is received by the department from the clerk of a court of competent jurisdiction or proof is submitted of a judgment, order or decree relating to the parentage of the person;

3. Notification is received by the department from the clerk of a court of competent jurisdiction or proof is submitted of a judgment, order or decree relating to the adoption of the person. (Subd. a as amended by L. 1950, ch. 415, July 1.)

b. On every birth record made because of adoption, a notation that it is filed pursuant to paragraph three of subdivision a. of section 567–2.0 of the administrative code of the city of New York shall be entered. (Subd. b as amended by L. 1950, ch. 415, July 1.)

c. When a new birth record is made the department shall substitute such new record for the birth record then on file. The department shall place the original birth record and the proof, notification and papers pertaining to the new birth record under seal. Seals shall not be broken except by order of a court of competent jurisdiction. Thereafter when a certified copy of the certificate of birth of such a person is issued, it shall be a copy of the new certificate of birth, except when an order of a court of competent jurisdiction shall require the issuance of a copy of the original certificate of birth.